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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

CARL M. DRURY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

28 U.S.C. § 2255 ¶ 6(1) provides that a motion for relief pursuant to this statute shall be filed in circumstances here relevant within one year from the date an inmate's conviction becomes "final."

In this context, does a conviction become final at the time the Supreme Court denies a petition for certiorari on the direct appeal, or does it become final after the Supreme Court has issued a decision denying a petition for rehearing?

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PETITION FOR WRIT OF CERTIORARI

Carl M. Drury, Jr., respectfully petitions for a writ of certiorari to review the opinion of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated November 13, 2007, is officially reported at 507 F. 3d 1295, and is reproduced at App. A.

The order of the U.S. Court of Appeals for the Eleventh Circuit on petition for rehearing and petition for rehearing en banc, dated January 14, 2008, is reproduced at App. B.

The order of the U.S. District Court for the Southern District of Georgia, dated April 9, 2007, is unofficially reported at 2007 WL 1100497, and is reproduced at App. C.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on November 13, 2007, and the petitioner's timely filed petitions for rehearing and rehearing en banc were denied on January 14, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3, because it is being filed within 90 days of the entry of the order denying the petitions for rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 28 U.S.C. § 2255 ¶ 6(1) of the Antiterrorism and Effective Death Penalty Act. The statute is reproduced at App. D.

STATEMENT OF THE CASE

In 2001, Petitioner Drury was indicted by a federal grand jury for violation of 18 U.S.C. § 1958 (murder for hire), and possession of a firearm in connection with a crime of violence under 18 U.S.C. § 924(a). Drury was convicted on all counts following a jury trial, and his sentences totaled 204 months. Drury appealed and the convictions and sentences were affirmed. United States v. Drury, 396 F. 3d 1303 (11th Cir. 2005). Drury filed a petition for a writ of certiorari which was denied by the Supreme Court on October 3, 2005. Drury v. United States, 546 U.S. 813 (2005). Drury's petition for rehearing was denied on November 28, 2005. Drury v. United States, 546 U.S. 1055 (2005).

Drury then initiated the instant proceedings by filing for relief under 28 U.S.C. § 2255 in the district court on November 27, 2006. The relevant section of 28 U.S.C. § 2255 provides that such a motion be filed within one year from the date on which the conviction becomes final. Drury's § 2255 motion was filed more than one year after the denial by of his petition for certiorari, but within one year of the denial of his petition for rehearing. The magistrate judge issued a report and recommendation concluding that Drury's § 2255 motion should be dismissed as untimely. On April 9,

2007, the district court adopted the magistrate's report and dismissed Drury's § 2255 motion as having been untimely filed. After timely filing a notice of appeal and subsequent motion for a certificate of appealability, Drury was granted a certificate of appealability on the timeliness of his § 2255 motion. (App. E). On November 13, 2007, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court by a panel decision. (App. A). Drury's petitions for rehearing and rehearing en banc were denied January 14, 2008. (App. B). Drury now petitions for a writ of certiorari.

ARGUMENT

The decision of the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of Petitioner Drury's § 2255 motion for having been filed outside the one-year limitation prescribed by 28 U.S.C. § 2255 ¶ 6(1). The Eleventh Circuit's opinion holds that the one-year limitation runs from the date of denial of a petition for a writ of certiorari, even when a petition for rehearing is pending before the Supreme Court. This Court should grant certiorari to review whether the lower court's holding effectively deprives an inmate who has filed for a rehearing of a denial of a writ of certiorari the full one-year period for filing a § 2255 motion prescribed by Congress.

1. A conviction is not "final" under § 2255 until the Supreme Court denies a petition for rehearing.

Under the circumstances applicable to this petition, a motion under 28 U.S.C. § 2255 must be filed within one year from the date the movant's

conviction becomes final. 28 U.S.C. § 2255 ¶ 6(1). In holding that a petition for rehearing with the Supreme Court did not toll the one-year period beyond the date that the petition for a writ of certiorari was denied, following the decisions of a number of other circuits, the Eleventh Circuit's decision relied in great part on Supreme Court Rule 16.3, entitled "Disposition of a Petition for a Writ of Certiorari," which provides:

> Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

Sup. Ct. R. 16.3. The Eleventh Circuit held that the language of the rule stating that "[t]he order of denial will not be suspended pending disposition of a petition for rehearing" meant that a conviction was final at the time of the order of denial. (App. A).

This holding effectively reduces the time for filing a § 2255 motion when a petition for rehearing is filed, thereby judicially diminishing a right afforded to prisoners by Congress. This is so, because an inmate may not initiate post-conviction proceedings while his direct appeal is still pending. In McIver v. United States, 307 F. 3d 1327, 1388 (11th Cir. 2002) (footnote 2), the Eleventh Circuit

stated in dicta that "clear precedent of this Court directs that collateral claims should not be entertained while a direct appeal is pending." When a petition for rehearing is filed, there remains pending an action of the Supreme Court until the petition is granted or denied. In this sense, the direct appeal of the conviction is not yet final, and a collateral motion under § 2255 motion cannot normally be filed.

This proposition is consistent with the reasoning of a number of other circuits. In United States v. Cook, 997 F. 2d 1312 (10th Cir. 1993), a prisoner filed a § 2255 motion while his direct appeal was still pending before the Court of Appeals. The court held that the § 2255 motion, which had been filed in the alternative as a motion to dismiss and a motion for new trial, could not be treated as a § 2255 motion. The court stated, "Absent extraordinary circumstances, the orderly administration of criminal justice precludes a district court from considering a § 2255 motion while review of the direct appeal is still pending. Id. at 1319. Similar reasoning has been applied in United States v. Taylor, 648 F. 2d 565, 572 (9th Cir. 1981), stating "[t]he District Court may entertain a collateral motion during the pendency of a direct appeal if 'extraordinary circumstances' outweigh the considerations of administrative convenience and judicial economy"; and Capaldi v. Pontesso, 135 F. 3d 1122, 1124 (6th Cir. 1998), holding "we now adopt the rule espoused by multiple Circuits that in the absence of extraordinary circumstances, a district court is precluded from considering a § 2255 application for relief during

pendency of the applicant's direct appeal." The reason for these holdings lies in the judicial need to minimize "the risk of duplicitous and conflicting judicial administration . . . inasmuch as the disposition of the direct appeal may render the [§ 2255] motion moot." United States v. Taylor at 572.

While these cases address the situation of a § 2255 filed during pendency of a direct appeal before the Court of Appeals, it stands to reason that the opinions would extend to an appeal pending action on a petition for rehearing with the Supreme Court. A petition for rehearing is not a mere formality, and it is no less likely to render a § 2255 motion moot or cause conflicting decisions in the same case to be issued by a higher and lower court. Therefore, in the case of an inmate who exhausts his direct appeal options with the Supreme Court by the filing of a petition for rehearing, the one-year limitation cannot logically already be running with the denial of certiorari. This result would lead to inmates who take advantage of their full direct appeal options being denied their full one-year to file a collateral appeal. Therefore, the one-year limitation of § 2255 must begin running when a petition for rehearing is denied by the Supreme Court. Only at this point would no further action be possible on the direct appeal, the possibility of conflicting actions by a higher and lower court removed, and the conviction "final" according to that term's ordinary meaning.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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